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# ADR Paradigms and Intervenor Values

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## I. INTRODUCTION

Mediators insist that they can be neutral intervenors when assisting parties reach a negotiated settlement. They view their role as that of facilitating the development of settlement terms that the parties find acceptable, irrespective of whether the mediator approves of them or if they are in the best interests of either the parties or the public.[1]

Some critics assert that it is not possible for an intervenor to be neutral.[2] They contend that any individual, including someone serving as a mediator, has personal goals, reputations, and motives that interact with the competing concerns of the parties. All of these factors must be resolved in a way that is satisfactory to everyone.[3] Thus, the mediator has a decided interest in how the dispute is resolved.

Other critics argue that mediators of such public policy disputes as the siting of toxic waste disposal facilities or the allocation of block grant monies have a duty not to be neutral.[4] These critics urge that rather than permitting the parties' preference to dictate the outcome the mediator has an affirmative duty to insure that the settlement outcome protects the interests of all those persons not officially represented in the negotiating session and that constitutes the optimum possible arrangement for each party.[5]

This debate has important practical implications in the development and

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1. A representative statement of such a viewpoint is stated in Newman, *Mediation and Fact-Finding*, PORTRAIT OF A PROCESS-COLLECTIVE NEGOTIATIONS IN PUBLIC EMPOLYMENT 201 (1979).

2. Susskind and Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAVIORAL SCIENTIST 255 (1983); Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); Bernard, Folger, Weingarten, Zumeta, *The Neutral Mediator: Value Dilemmas In Divorce Mediation*, 4 MEDIATION QUARTERLY 61 (1984).

3. P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTRUAL PERSPECTIVE (1979).

4. Susskind and Ozawa, *supra* note 2.

5. *Id.* at 63. For a related discussion, see H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

expansion of Alternative Dispute Resolution (ADR) programs. For example, the Community Dispute Resolution Centers Program of New York State administers 60,000 cases annually.[6] Recently, the Office of Court Administration (OCA) promulgated guidelines for these centers that define a mediator's duty when, during the course of a mediation session, one party alleges that the other has committed acts of spousal or child abuse. The regulations require the mediator to assess quickly the credibility of such accusations. If the accusations appear to be plausible, the mediator is to stop the hearing immediately, publicly assert that "domestic violence is not a negotiable issue," admonish the accused party to cease such conduct, and offer available support assistance to the victim.[7] Divorce mediators debate what their duty is when servicing a

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6. 1981 N.Y. Laws ch. 847 (codified as amended at N.Y. CRIM PROC. LAW § 170.55(4) (McKinney 1982) (adding N.Y. JUD. LAW. §§ 849-a to -g (McKinney Supp. 1983-1984) (entitled Community Dispute Resolution Centers Program). *See* THE COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM: A PROGRESS REPORT (1984).

7. The guidelines for domestic violence cases were adopted on January 1, 1984 and those for child abuse cases on August 14, 1984. The guidelines are set out below:

GUIDELINES FOR DISPUTE RESOLUTION CENTERS REGARDING DOMESTIC VIOLENCE.

The Community Dispute Resolution Centers Program serves as a resource for the citizens and the justice system in the State of New York. We recognize the danger that a program contracting with the Unified Court System to provide dispute resolution services may be inappropriately used as a substitute for prosecution in domestic violence cases. It is not the intent of dispute resolution centers to inhibit or limit an individual's access to any legal remedy or protection.

The following guidelines have been developed by the dispute resolution centers to assist in identifying domestic violence and in taking appropriate actions in these cases.

GUIDELINE I. The Dispute Resolution Center staff must be trained in the issues regarding domestic violence. Service programs for domestic violence victims and batterers must be identified and methods for referring complainants and respondents must be developed. The programs shall work with the local prosecutor's office, law enforcement and the courts to assist appropriate case flow, enforcement and victim protection in domestic violence cases.

GUIDELINE II. Domestic violence is not a negotiable issue.

GUIDELINE III. All domestic cases involving actually or potentially violent or imminently dangerous situations shall be referred to court or the appropriate agency for proper action.

GUIDELINE IV. It is the obligation of the dispute resolution centers to inform domestic violence complainants and respondents of their available options. In domestic violence cases in which the complainant expresses interest in the mediation alternative, it is the obligation of the community dispute resolution center to inform the complainant that mediation is remedial and nonpunitive and that mediation cannot provide legal protection against future violence.

GUIDELINE V. If both parties, having been informed by the dispute

resolution center staff of all available options, still voluntarily choose to request services from the center, the center may provide assistance to both parties with services designed to inform, protect, educate, and support the individuals but in no way excuse the violent behavior.

GUIDELINE VI. In providing any services to domestic violence cases the following precautions should be taken:

1. Staff should speak to each party individually to obtain as much information about the circumstances as possible.

2. Staff should make every effort to obtain all legal protections available for the victim.

3. Any staff person providing services to domestic violence cases must be trained in issues regarding domestic violence.

4. Staff should never encourage a domestic violence victim to withdraw or request dismissal of pending criminal charges or to not pursue criminal, civil or social service remedies.

5. It is the obligation of the dispute resolution centers to conduct follow up services with any case in which domestic violence has been identified to assure the protection of the victim and the availability of legal and social service resources.

GUIDELINES FOR COMMUNITY DISPUTE RESOLUTION CENTERS REGARDING CHILD ABUSE.

GUIDELINE I. It is the policy of the Community Dispute Resolutions Centers Program that child abuse is not a proper subject for the mediation process. All parties to a mediation shall be advised that evidence of child abuse, whether or not relevant to the issues involved, is inadmissible therein for any purpose, and that if such evidence is adduced, it shall not be deemed a confidential communication under the Judiciary Law.

GUIDELINE II. For the prupose of these guidelines, the term, "child abuse" shall mean an act or failure to act by a parent or other person legally responsible for a child which, as to such child: (i) inflicts or allows to be inflicted upon him or her physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or (ii) creates or allows to be created a substantial risk of physical injury to him or her by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotiaonl health or protrated loss or impairment of the function of any bodily organ, or (iii) commits, or allows to be committed, a sex offense against him or her, or allows him or her to engage in a sexual performance.

GUIDELINE III. Each dispute resolution center (hereinafter "center") shall, during its intake process, exercise maximum care and effort to determine whether a matter for which mediation is sought involves alleged or actual child abuse. Upon any such determination, a center shall advise the parties that the matter may not be mediated. At the same time, the parties shall be informed of any resources made available by the community to victims and perpetrators of child abuse. If, based on the information learned at intake, a center reasonably believes that a child's health or physical well-being is in

couple with disproportionate bargaining skills and resources.[8] Mediators of employment discrimination claims experience a similar dilemma as they hear parties seriously entertain a proposed settlement that is less advantageous to the complaining party than he would have secured in a traditional agency proceeding.[9] Non-unionized organizations are developing ADR programs to resolve employee grievances ranging from employment discrimination claims to routine office grievances;[10] universities utilize ombudsperson procedures to resolve intra-organizational concerns.[11] Participants in labor-managment relations are experimenting with new models for conducting discussions during the term of the contract and intervenors assist them in developing such labor-managment committees.[12] Finally, the National Institute for Dispute Resolution is underwriting experiments in which governmental employees offer medi-

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jeopardy, it shall also refer the matter to the statewide central register of child abuse and maltreatment or to a local child protective service.

GUIDELINE IV. If the mediation process has begun and evidence of actual or alleged child abuse is adduced, the mediator shall (i) stop the mediation process; (ii) consult with each party individually, for the purpose of obtaining as much information about the circumstances as is possible; and (iii) after consultation with such other persons as his or her center may require, determine whether to resume the mediation process. In determining whether to resume the mediation process, the mediator shall consider the progress achieved by the parties before the process was stopped, the extent to which the evidence of child abuse relates to the matter being mediated and the extent to which disclosure of actual or possible child abuse by one of the parties to the mediation has affected his or her ability to conduct the mediation process in an impartial fashion. Whether or not the process is resumed, the mediator shall take such steps as are described in Guideline III herein.

GUIDELINE V. To promote the purposes of these guidelines, and to facilitate compliance therewith, staff of each center shall receive instruction concerning the issues relating to child abuse. To this end, service programs for child abuse victims must be identified in each community and procedures developed for referral of complainants and respondents. Each center shall work closely with local prosecutorial authorities, law enforcement personnel and the courts to assure victim protection, proper case disposition and effective enforcement in child abuse matters.

8. Haynes, *Matching Readiness and Willingness To the Mediator's Strategies*, 1 NEGOTIATION J. 79 (1985).

9. PRELIMINARY REPORT ON THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS EMPLOYMENT DISCRIMINATION MEDIATION PILOT PROJECT, EDUCATIONAL FUND FOR INDIVIDUAL RIGHTS (1984) (prepared for the First National Conference on Resolving EEO Disputes Without Litigation).

10. *Id.*

11. *Id.*

12. LEONE, THE OPERATION OF LABOR-MANAGEMENT COMMITTEES (1982); Hoyer, Relations By Objectives: An Experimental Program of Management-Union Conflict Resolution (unpublished doctoral dissertation, University of Michigan 1982); Newman, *supra*, note 1, at 200.

ation services to resolve selected public policy disputes.[13] In each instance, the intervenor's obligation and duties must be addressed and answered.

Each of these ADR program efforts resemble one another in their commitment to promoting consensual decision-making by the parties to the controversy and each state that the intervenor's task is to facilitate such consensual decision-making. The family resemblence stops there, for some prohibit any agreements inconsistent with institutional policies;[14] some only allow agreements that establish substantive terms which harm no one and maximize all possible mutual gains.[15] Some prohibit the parties from reaching a consensual decision on certain subjects.[16] Other ADR efforts assert with vigor that the parties' preferences are to be decisive.[17]

To assess whether the intervenor's role and responsibilities in these varying contexts should be comparable, and whether any of them can be neutral in the manner advocated by mediators, one must compare these various ADR programs in terms of their program goals, jurisdictional range, and the rules, principles, and criteria that are deemed relevant to resolving the controversies they address. Only then can one offer an appropriate conceptualization of an intervenor's obligations and responsibilities of office. Section I identifies the three basic questions that all ADR programs must answer and outlines the nature of an appropriate answer to each one. These answers provide the framework for designing any ADR procedure. Section II describes and compares three different ADR program paradigms. These models feature consensual decision-making as the primary dispute resolution procedure and provide for third-party intervention to facilitate that process. Section III describes the three different intervenor postures that attach to their respective ADR program paradigm. This highlights the decidedly different roles and obligations of the intervenor and puts into relief the appropriate manner in which the question of a mediator's neutrality can be constructively addressed.

## II. THE DEFINING QUESTIONS

Consensus decision-making incorporates the notion that controversies are resolved only upon the acceptance and ratification of the proposed accord by all participating parties.[18] It contrasts most sharply with those procedures in which some individual or body has the authority to impose a binding decision to resolve the controversy. I shall use the term "negotiation" to describe the

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13. DISPUTE RESOLUTION FORUM 6 (June 1984).

14. *The Non-Union Complaint System at MIT: An Upward-Feedback, Mediation Model*, EDUCATIONAL FUND FOR INDIVIDUAL RIGHTS (1984).

15. Suskind & Ozawa, *supra* note 2.

16. Prohibited subjects of bargaining in federal sector labor-management relations, for example, are set forth at 5 U.S.C. § 7106(a) (1982).

17. *See supra* note 6.

18. For a related discussion of this concept in an organizational setting, see VROOM AND YETTON, LEADERSHIP AND DECISION-MAKING (1973).

tactics and strategies that various advocates use to develop consensus.[19] This does not assume that negotiation requires full disclosure of pertinent data, honest representation of acceptable outcomes, or the like.[20] Rather, the term describes a procedure in which two or more parties identify issues of concern and propose solutions. The negotiation process is distinctive because every party has a veto over the outcome.[21]

In designing any ADR program, one must choose a primary dispute resolution procedure, establish its jurisdictional range, and define the participants' roles. When incorporating negotiation as the primary dispute resolution process, ADR designers must ask three defining questions:

1. Does the use of negotiation as the primary dispute settlement methodology for solving some or all disputes promote any social or institutional goals?

2. What types of jurisdictional exemptions, if any, should attach to the use of the negotiation procedure?

3. What types of tasks and responsibilities attach to the various participants in the process and the auxiliary roles that are designed to facilitate the negotiated settlement?

If the answer to Question 1 is negative, then the remaining questions do not arise. If the answer is affirmative, then the answer to Question 2 cannot be so extensive as to render meaningless the range of disputes which can be resolved by negotiation.[22] The answers to Question 3 define the participant roles for both the primary procedure and the procedures that are designed to help the negotiators reach a successful outcome.

Answering the first question requires one to argue that using the negotiation process to resolve some or all controversies promotes the overall general welfare. This is a straightforward consequentialist argument: if using negotiation promotes goals or objectives that we desire, then, other things being equal, we should be prepared to endorse its use.[23] The National Labor Relations

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19. This term has gained popular application through such works as H. COHEN, YOU CAN NEGOTIATE ANYTHING (1980) and R. FISHER & W. URY, GETTING TO YES (1981).

20. For a discussion of the impact of truthful disclosure on negotiation settlements, see H. RAIFFA, *supra*, note 5, at 51-65; the advantages of engaging in strategic misrepresentations of material fact are also examined at 142-45.

21. Labor Management Relations Act (Taft-Hartley), 29 U.S.C. § 158(d) (1982) states: "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hour, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

22. One cannot consistently assert that using the negotiation process to resolve some problems promotes desirable social benefits but then insist that no problem should be eligible for resolution by negotiation.

23. This structure of normative argument is examined in Dworkin, *Hard Cases*

Act,[24] for instance, endorses the use of collective bargaining by employers and unions to resolve their disputes regarding wages, hours, and other terms and conditions of employment[25] because of the belief that collective bargaining will promote a reduction in industrial strife.[26] At this level, other dispute settlement procedures such as legislation, arbitration, or force, compete with negotiation. The basis we use to select one procedure rather than another embody two different types of criteria. One type of criteria includes such utilitarian elements as the efficiency of the process, the durability of the result, and the precedent established (both procedurally and substantively) for resolving future controversies of a similar nature. The other criteria are more aptly labeled ideal-utilitarian;[27] they identify those features of a society that we wish to sustain or develop. This category includes such goals and principles as increased participation in the process by those affected by the outcome, enhancing personal dignity by requiring those affected by the outcome to assume primary responsibility for resolving their concerns, and the preservation of the most extensive liberty possible for managing and resolving a broad range of matters affecting us. Proponents of the negotiation process suggest that its use promotes those goals more satisfactorily than other available procedures.

Scattered empirical data and anecdotal information suggests that consensus decision-making advances some or all of these consequentialist goals.[28] ADR programs report that parties comply with negotiated agreements for a sustained period of time,[29] interpersonal relationships are not polarized,[30] and those affected by the outcome assume major roles in designing solutions to their concerns.[31] There are substantial conceptual difficulties involved in comparing these results of negotiation with the goals promoted by using other dispute resolution procedures.[32] Certainly, however, at an unrefined, macro level there is no disagreement that legislating certain solutions or litigating certain matters is more cumbersome than encouraging negotiated settlements and that ignoring a problem can generate costs that negotiating might avoid or minimize. Cumulative evidence that the negotiation process promotes these goals

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in TAKING RIGHTS SERIOUSLY 82 (1977) and Wasserstrom, *Preferential Treatment* in PHILOSOPHY AND SOCIAL ISSUES 51-54 (1980).

24. 29 U.S.C. §§ 151-69 (1982).

25. 29 U.S.C. § 159(a) (1982); *see also* NLRB v. Katz, 369 U.S. 736 (1962).

26. 29 U.S.C. § 151 (1982).

27. For a related discussion of this theory, see R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1979).

28. NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT, U.S. DEPARTMENT OF JUSTICE (1980); BRINDENBACK, THE CITIZEN DISPUTE SETTLEMENT PROCESS IN FLORIDA: A COMPREHENSIVE ASSESSMENT (1980).

29. NEIGHBORHOOD JUSTICE CENTERS FIELD TEST, *supra* note 28, at 104.

30. *Id.* at 89.

31. *Id.*

32. Stulberg, *The Theory and Practice of Mediation*, 6 VT. L. REV. 85, 111-113 (1981).

at least as effectively as any other dispute resolution procedure counts in favor of answering the question in the affirmative.

Answering the second question forces ADR program designers to identify the constraints which should be imposed on the dispute resolution procedure adopted by the answer to the first question. Program designers must state or acknowledge the matters for which the negotiation process shall or shall not be the primary process for establishing primary rights and duties. There are three types of jurisdictional exemptions: substantive public policy constraints; administrative constraints; and constraints tied to the participant skills required in the dispute resolution procedure.

There may be strong public policy reasons for not using the negotiating process to resolve certain substantive disputes. For example, in dealing with persons who engage in acts of violence, the public wants to affirm that such acts are prohibited and that severe sanctions, including the loss of one's liberty, attach to such conduct. Permitting identifiable killers to negotiate with the family of the deceased victim to reach mutually acceptable settlement terms rather than forcing the killer to face a public trial and its attendant penalties violates that strong public policy. Although national policy encourages an employer and union to resolve certain issues relating to work rules via collective bargaining, Congress has restricted the range of mandatory bargaining subjects.[33] Employers are not required to negotiate such matters as product development and discontinuance or plant closings.[34] Even if such decisions result in severe consequences to the work force, the justification for such an exemption is that persons should enjoy the liberty to engage in entrepreneurial enterprises. The risks of gain or loss attached to such decisions justify permitting the owners and investors to make such decisions independent of the people who will be significantly affected by their implementation.

There are administrative reasons for constraining the subject matter for which the negotiation process serves as the primary dispute resolution procedure. Some areas of conduct operate more efficiently and consistently if they are directed or governed by rules, as contrasted with those established pursuant to the preferences of the individual participants. For example, rights of heirs, which are established by a complex web of statutory and judicial guidelines, fall into this category. If Testator A bequeathed his entire estate to his son, B, who was already wealthy, to the exclusion of his other son, C, a pauper, one could argue forcefully that the practice of writing wills should be displaced by a procedure in which an official simply calculates the size of the decedent's estate, identifies all persons who could reasonably be expected to benefit from it, and thereafter invites them to meet to negotiate an allocation formula acceptable to each of them. However, the present procedure, among other things, promotes laudable goals such as predictability, efficiency, and

33. Cox & Dunlop, *Regulation of Collective Bargaining By the NLRB*, 63 HARV. L. REV. 389, 427 (1950).

34. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

consistency[35] that override those goals promoted by the negotiation process.

The final category for exempting certain types of disputes from the negotiating process relates to the profile of the participants, not the subject matter. This exemption occurs when one or more of the participants is powerless because he lacks the ability or resources to negotiate in a manner distinguishable from simple, systematic capitulation to another's demands. In this context, some persons oppose the use of mediated negotiations to resolve marital problems in which one spouse is believed to be a victim of physical abuse.[36] This is because the victim may be so traumatized by her partner that she will agree to whatever settlement terms he proposes simply to appease him and purchase some time free of physical strife. According to this argument, it is a sham to claim that there is a mutuality of agreement under such circumstances. The generalized principle is that no person or group without a degree of power to control their destiny vis-à-vis their negotiating counterpart should resolve problems by negotiating; otherwise, sheer power dictates the results.[37] This concern permeates the development of ADR programs addressing problems involving parents and children,[38] teachers and students,[39] and institutional officials and their wards.[40]

All of the controversial issues relating to the use of the negotiation process reside in the debates surrounding the answer to this second question. These debates are complex because individuals must identify the answers to each of the three defining questions in order to weigh the competing strengths and weaknesses of every dispute resolution procedure that is posed as an alternative to negotiation. The need to make such decisions in the practical world is urgent. A governor must decide whether to negotiate with prisoners who hold prison administrators and guards as hostages.[41] A company must decide how

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35. For a related discussion, see R. WASSERSTROM, THE JUDICIAL DECISION (1961).

36. UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE, U.S. COMMISSION ON CIVIL RIGHTS (1982). *See* Lerman, *Stopping Domestic Violence: A Guide For Mediators*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (ABA 1982)

37. For a related discussion of principled negotiation, *see* R. FISHER & W. URY, *supra* note 19, at 6.

38. BLOCK, MEDIATION AN ALTERNATIVE FOR PINS (A RESEARCH REPORT OF THE CHILDREN'S AID SOCIETY'S PINS MEDIATION PROJECT) 12-17 (1982).

39. See the proposal for development of the mediation project commenced in July, 1983 at the William Cullen Bryant High School in the City of New York which is administered by the Metropolitan Assistance Corporation (Victim Services Agency) and funded in part by the New York City Youth Bureau. This project is described in Davis & Porter, *Mediation in American Schools*, 1985 Mo. J. Dispute Resolution ——.

40. J. KEATING, IMPROVED GRIEVANCE PROCEDURES (1976).

41. For a discussion of the prisoner uprising at the Attica Correctional facility, see T. WICKER, A TIME TO DIE (1975).

to handle citizens who are picketing its nuclear power plant.[42] If one spouse proposes to negotiate the terms of a divorce settlement independent of the adversarial litigation context, the other must respond.[43] A mayor must choose how to deal with citizen groups who are protesting the closing of a neighborhood fire station by conducting a sit-in at their cherished firehouse.

The answers in such cases are not clear; they are legitimately debatable. What is not controversial, however, is that such judgments significantly influence the integrity and manner in which the actual negotiation of those items that remain subject to the process proceed. For instance, state and school officials establish the curriculum requirements for high school graduation;[44] they are not subject to negotiation with students. However, school officials might establish a mediation program to handle disciplinary charges involving students.[45] The program would encourage students accused of harassing or annoying each other in class to resolve their problem via mediated negotiations, but the students could not agree to resolve their problem by having one student drop a required course for that would violate the standards established by other procedures. Some court-diversion programs for first-offender youths state that the accused and victim can establish terms of restitution via mediated negotiations.[46] What is not subject to negotiation is whether the youth is responsible for the damage or the amount due;[47] what they negotiate is the form of payment.

The range and type of disputes to which the negotiation process attaches affects the degree to which it promotes the goals that led to its adoption in the first place. Placing too severe a set of restrictions on matters eligible for negotiation leads to the process being simply a shell for rubber-stamping a conclusion reached in some other forum.

When ADR designers have identified both those goals promoted by using negotiation as the primary dispute resolution procedure and the jurisdiction to which it will apply, then one can elucidate the rights and obligations of the various participants to the process. One way to examine the remaining question is to analyze those ADR program paradigms that result from the schematic answers given to the preceding questions.

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42. N.Y. Times, Mar. 14. 1977, A22, col. 1.

43. R. COULSON, FIGHTING FAIR (1983); Haynes, *Matching Readiness and Willingness to the Mediator's Strategies*, 1 NEGOTIATION J. 79 (1985).

44. *See, e.g.*, N.Y. EDUC. LAW § 3204 (McKinney 1981) (establishes studying U.S. government as a curriculum requirement).

45. *See supra* note 39.

46. PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION: PRETRIAL DIVERSION (1978); PROC. OF THE NAT'L SYMP. ON PRETRIAL SERVICES (1980).

47. PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION *supra* note 46.

## III. ADR Program Paradigms

ADR program designers who promote consensual decision-making as the primary dispute resolution procedure also define its jurisdictional reach. In so doing, they simultaneously establish the relevant criteria for decision-making that bind the negotiators. Three distinct ADR paradigms emerge, each distinguishable on the basis of the discretion accorded to the negotiators to strike agreements they find acceptable.

### A. *Institutional ADR*

An institutional ADR program permits negotiators to resolve the defined range of issues in a manner acceptable to them as long as the resolution does not conflict with other institutional goals and policies. Indeed, one party could insist to the point of impasse to exempt certain solutions from consideration on the ground that it would violate some institutional regulation.

For example, efforts to promote ADR procedures in non-union employment settings operate on the premise that the decision reached by the participants must be in accord with that institution's policies and practices;[48] a supervisor cannot resolve his disagreement with a contentious subordinate by agreeing to give him a pay adjustment that is inconsistent with the company's policies governing the timing of raises or level of compensation. Presumably, it violates a university's policy if a male professor resolved a dispute with a female student regarding her charges of sexual harassment by agreeing to provide the student in advance with a copy of the final exam in exchange for her commitment not to press charges.[49] Student mediators promoting consensus among students charged with disciplinary infractions could not routinely encourage resolutions in which one student agreed to transfer to another high school.[50] In each of these instances, the policy makers for the institution conceive of the institution as having goals, values, and practices that trump the negotiated outcomes that individual members of the organization might otherwise find acceptable.

### B. *Legal ADR*

In this paradigm, parties can reach whatever conclusion they find agreeable as long as it is consistent with those legal rights that the parties could vindicate in a courtroom.

There is a sliding scale of ADR approaches in this category. Some ADR programs, such as divorce mediation projects [51] or the mini-trial,[52] narrowly

48. *See supra* note 14.
49. *Id.*
50. *See supra* note 39.
51. J. Haynes, Divorce Mediation (1981); R. Coulson, *supra* note 43.
52. J. Marks, E. Johnson, P. Szanton, Dispute Resolution in America:

steer settlement discussions toward only those solutions that parties would most likely have obtained in a courtroom proceeding. This conservative approach is designed to reassure participants that they are no worse off for negotiating the agreement than they would have been had they proceeded with litigation. In spirit, this posture is more akin to the institutional ADR model than need be the case for the legal ADR paradigm.

Community dispute resolution, which involves court-referral or neighborhood based programs for problems among neighbors, landlords and tenants, merchants and consumers, exemplify a less restrictive form of this paradigm.[53] As is true for any lawsuit, parties in these situations enjoy extensive latitude in deciding whether to press their legal demands or accept settlement terms that may be less favorable than the optimistic outcome of a successful lawsuit, but which are more attractive because they promote other interests and needs. As long as the settlement terms themselves are not illegal, the parties are free to establish priorities according to their own preferences. What is true of these matters, however, is that some party always has the alternative of trying to obtain relief by initiating a lawsuit.

The least restrictive form of this paradigm are those instances in which the negotiating parties cannot achieve their objectives by initiating a lawsuit or insist that a matter submitted to negotiation be resolved in a particular way. When unions and management meet to negotiate wages, they must reach an agreement or leave the matter twisting in impasse; the law does not prescribe specific criteria that the parties must consider in reaching an accord.[54] In Connecticut, negotiators representing state and local government agencies and non-profit service providers had complete legal freedom to establish program priorities and budget allocations for the distribution of $33.1 million of Social Service Block Grant monies.[55] What remains true of these efforts, however, is that any party to the discussion can assert a legal right not to discuss a particular issue and the subsequent discussions would be shaped accordingly. In the above-cited examples, management could resist negotiating any non-mandatory subject of bargaining,[56] and state officials in Connecticut could

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PROCESSES IN EVOLUTION 34 (1984).

53. *See* ABA DISPUTE RESOLUTION PROGRAM DIRECTORY (L. Ray ed. 1983).

54. Standards that are appropriate to the resolution of collective bargaining sessions, though not binding, are identified in such statutes that prescribe what interest arbitrators must take into account when determining terms and conditions of employment. *See, e.g.*, N.Y. CIV. SEV. LAW § 209(4) (McKinney 1983).

55. A NEGOTIATED INVESTMENT STRATEGY: A JOINT AGREEMENT ON PRINCIPLES, PRIORITIES, ALLOCATIONS AND PLANS FOR THE SOCIAL SERVICES BLOCK GRANT, OCTOBER 1 1983-SEPTEMBER 30, 1984 (December 22, 1982).

56. Douds v. Int'l Longshoremen's Ass'n., 241 F.2d 278 (2d Cir. 1957); NLRB v. Detroit Resilient Floor Decorators Local 2256, 317 F.2d 269 (6th Cir. 1963); NLRB v. Wooster Div. of Borg-Warner Corp, 356 U.S. 342 (suggesting management cannot insist on negotiating non-mandatory subjects); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

have resisted any proposal to spend the Social Service Block Grant monies on establishing a public school teacher continuing certification program.[57]

This paradigm posits a scheme of legal rights and duties as the pivotal points around which people negotiate. Parties are free to waive their claims so long as the ultimate terms of agreement do not violate the law. Imaginative negotiators in many contexts refrain from describing all problems in terms of legal rights and obligations and invite their counterparts to identify basic needs and concerns in a way that permits a broad range of possible solution.[58] While participants in these situations operate within or around the legal guidelines, they do not try to change them within the negotiating context. Although this model is eminently serviceable in a broad range of controversies, it is inadequate for resolving those more explosive disputes that erupt without being so nicely packaged.

### C. *Social ADR*

In these programs, negotiators have the discretion to resolve the matter in whatever manner they find acceptable. This does not mean that they ignore the legal ramifications of their decisions, but rather, they treat such factors as one more element to address in reaching a satisfactory resolution.

For example, when citizen groups in Minnesota protested the utility companies' construction of a high voltage transmission line,[59] part of the controversy centered on the perceived inadequacy of the statutorily defined formula for awarding easement compensation and on the administrative agency decision that established the corridor within which the line had to travel.[60] The parties did not feel constrained from negotiating a substantive agreement whose provisions altered these legal requirements, for they agreed to the additional element of working cooperatively to change the law.[61] One quickly discerns that social ADR efforts incorporate a frequent form of social behavior—advocating and securing change through discussion, persuasion, and action—into a structured form. Indeed, in this sense, negotiation is the central, non-violent change-making procedure of a democratic society.

Institutional policies and rules guided the negotiators' options in the first paradigm, and legal rules and principles regulated the participants in the second paradigm. What principles guide the negotiators in the social ADR model?[62] There are numerous candidates, but none is always applicable or

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57. *See supra* note 55, at 36.

58. STULBERG, *The Legacy of our Adversarial System* in A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION (1984).

59. REPORT TO THE FORD FOUNDATION (1978).

60. *Id.*

61. *Id.*

62. Compare this discussion with Ronald Dworkin's analysis of the concept of discretion in Dworkin, *The Model of Rules* in TAKING RIGHTS SERIOUSLY 31 (1977).

dominant. They include the wisdom of the agreement, its durability, its feasibility, its legality, the extent and nature of its impact on those not participating in the negotiations, its political acceptability to the negotiators' constituents, its impact on the negotiator's self-interest, and the precedent it establishes. There are other criteria as well; not all are mutually exclusive nor equally compelling. More importantly, negotiating counterparts can use different criteria to justify their acceptance of proposed settlement terms.[63] In this paradigm, there are no specific principles or guidelines that serve to trump specific settlement terms and the individual negotiators do not need to use the same guidelines when contemplating whether to accept the proposed settlement terms. Systematic efforts that come within this social ADR paradigm include those projects that experiment with using mediated negotiations to resolve race riots,[64] Native American land claims,[65] prisoner uprisings,[66] environmental controversies,[67] and public policy disputes.[68]

Some ADR programs may fall under one paradigm, but operate more like another. For instance, important ADR efforts that are structured as a legal ADR model might operate like a Social ADR program because of the enormous latitude contained in the statutory guidelines. While negotiated settlements between parents and children accused of status offenses must receive court approval, there are almost no constraints upon what parties can agree to in resolving their problem. On the other hand, although restitution programs using negotiations are modeled along the legal ADR paradigm, participants operate much closer in spirit and practice to the Institutional ADR model. The paradigms are useful, however, in highlighting the range of freedom granted to the negotiators. This range indicates confidence in and fidelity to the negotiation process and its goals.

For each ADR paradigm, ADR advocates propose that intervenors assist negotiating parties reach a consensual agreement. Although the term "mediator" is often used to describe the intervenor, the outcomes the intervenor tries to facilitate and, derivatively, his or her options, strategies, and obligations, differ importantly among the potentially governing paradigms in which the intervenor is operating.

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63. Stulberg, *Negotiation Concepts and Advocacy Skills*, 48 ALB. L. REV. 719, 735 (1984).

64. COMMUNITY RELATIONS SERVICE, 1982 ANNUAL REPORT 18-19.

65. Joint statement by Secretary Cuomo and Kakirakeron released May 13, 1977 announcing mediated settlement of negotiations involving occupation of 600-acre campsite at Moss Lake in Adirondack State Park. N.Y. Times, May 14, 1977, 22, col. 1; Wash. Post. May 14, 1977, A6, col. 1.

66. ANNUAL REPORT OF THE NATIONAL CENTER FOR DISPUTE SETTLEMENT OF THE AM.ARB.A. (1973).

67. DRAFT GUIDELINES TO IDENTIFY, MANAGE AND RESOLVE ENVIRONMENTAL DISPUTES, U.S. DEPT. OF THE INTERIOR (1978).

68. Susskind, *supra* note 2.

## IV. INTERVENOR COMMITMENTS

Correlative to the ADR paradigms discussed above are the prototype intervenor postures of compliance officer, manager, and developer.

| ADR Paradigm | Institutional ADR | Legal ADR | Social ADR |
|---|---|---|---|
| Intervenor Role | Compliance Officer | Manager | Developer |

The respective intervenor obligations of office are analyzed below.

### A. *Intervenor As Compliance Officer*

Some intervenors help secure consensual agreements only if those specific commitments are compatible with organizational policy. The intervenor is obligated to veto agreements which violate those norms, or settlement discussions which mention violating them. The mediator *must* veto such subjects; the wisdom or utility of the pertinent policies and practices can be debated and changed at other levels or at other times.

Ombudsperson programs[69] and corporate ADR projects[70] clearly define such a role for the intervenor or counselor. The intervenor represents the institution. His or her loyalty is to it and intervenors encourage consensual decisions only insofar as they comply with its policies and practices. Consider the trivial case of a corporate dress code. A subordinate refuses to wear white shirts as required. His supervisor disciplines him and the subordinate appeals to an employee counselor to review the penalty. Clearly, the dress code policy requiring the white shirt is not subject to discussion; the counselor focuses only on the propriety of the discipline. Indeed, if the supervisor agreed not to enforce the code for the subordinate, other employees might complain about the lack of consistent treatment. Then, the counselor's duty would be to persuade the supervisor to act in compliance with the governing rule.

To be effective, this intervenor must be objective, articulate, and a person of integrity whom people feel confident in entrusting with their private embarassments or vehement protestations. Those traits are common with the other intervenor postures. However, part of this job is to persuade persons to agree, accept, and comply with certain institutional rules to which the intervenor must be faithful. In some contexts, that posture positively forecloses consensual decision-making and intervenor neutrality.

This is the most restricted of the ADR models in terms of what the parties are at liberty to decide and, concomitantly, what an intervenor can permit them to decide. If subject matter constraints severely deprive the parties of the

69. EDUCATIONAL FUND FOR INDIVIDUAL RIGHTS (1984).
70. *Id.*

freedom to negotiate anything of significance, the program has made consensual decision-making a sham and the intervenor's role is simply that of a reviewing officer whose job is to insure that conduct conforms to accepted practices. Under the best of circumstances, the parties, including the intervenor, are not at liberty to establish a set of priorities among the rules that differ from those established by the institution. A supervisor cannot agree to let one employee work at whatever time he or she wants while requiring a fixed time schedule for everyone else doing comparable work, even if that is acceptable to the supervisor. Individuals in other contexts, however, have greater freedom to negotiate settlement terms according to their own schedule of priorities.

### B. *Intervenor as Manager*

The intervenor's job in the Legal ADR model is to promote an agreement acceptable to the parties so long as all of its terms are legal. The intervenor, if he or she is to remain faithful to the paradigm that promotes consensual decision-making,[71] assumes the obligation to press persons to consider a range of settlement options that they find acceptable even if those solutions do not reflect the intervenor's personal preferences or those of the general public.[72] Since the parties' have the opportunity to establish both legal and non-legal priorities according to their own assessment of their needs and interests, the intervenor's obligation, unlike that of the compliance officer, is to manage the review. Unlike the developer's role, however, the manager must honor a party's claim to insist upon a particular legal rule or principle rendering certain options ineligible for discussion.

The Wagner Act, for example, has been interpreted to establish a range of mandatory bargaining subjects for employer and union representatives;[73] if either party presents a proposal addressing one of these topics, the other cannot ignore it, though it need not accept it.[74] Once the issue is raised, failure to address it constitutes the commission of an unfair labor practice.[75] For non-mandatory bargaining subjects, such mutuality is discretionary only.[76] If the employer does not want to discuss the subject of education tuition benefits, for example, he need not do so; and it the union were to press for its discussion, it could be charged with a statutory violation.[77] If the employer refuses to discuss it, then the intervenor who is trying to facilitate discussion toward an agreement might press the employer to reconsider his position in the interest of obtaining a settlement, satisfying the work force, or some other reason. But were the employer to persist in his refusal, the intervenor's responsibility is

71. Newman, *supra* note 2.
72. *Id.*
73. *See supra* notes 33, 34, and 56.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

clear; enforce the law by trying to get the union to drop consideration of its non-mandatory bargaining issue. The intervenor, in an effort to preserve his or her neutrality, might wrap such moves in the rhetoric of, "I don't favor the law or oppose it. But I must uphold it." That move fools no one. There can be no pretense that the mediator can be neutral on the issue of whether the matter can be discussed; the intervenor is obliged to enforce the subject matter jurisdictional restraints established by other bodies.[78]

To assert that an agreement must be legal leaves considerable latitude for the parties to resolve the matter in a way acceptable to them. A landlord, for example, can waive his right to collect the full amount due in rent arrearages in exchange for the tenant's commitment to pay some lesser amount in cash and vacate the premise promptly. Court personnel encourage parties to negotiate settlements rather than proceed with a trial or appellate argument.[79] Indeed, most ADR programs involving mediated negotiations prescribe this role for the intervenor.[80]

We can now analyze more sharply the OCA regulation of mediator conduct in spousal and child abuse cases.[81] Program regulators have established a subject matter limitation for all programs which require individual program personnel to improve their screening efforts to detect abuse cases and prevent them from being scheduled for a mediation session. When addressing the mediator's responsibility in those cases that bypass the screening process and reach mediation, program regulators have conflated two intervenor models into one. The policy not only requires the mediator to prevent the parties from consummating such obviously illegal agreements as "fighting is permitted only three times per week," but also requires the intervenor to assert affirmatively to the accused perpetrator that his conduct is objectionable and furnish whatever assistance possible to the victim. This converts the intervenor's posture from that of a manager to that of compliance officer. The more consistent posture for the intervenor in such programs would be to exercise one of two options: close the hearing on the principle that an exempt subject matter improperly passed the screening mechanism or let the parties continue to try to reach an agreement that is legal and durable, but if impasse for any reason is reached, close the hearing.

The intervenor operating as a manager, however, is not effective when trying to resolve controversies involving parties who do not recognize or accept

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78. E. ROBINS, A GUIDE FOR LABOR MEDIATORS 7 (1976) makes this point although frequently the rhetoric among labor mediators is that they can and must remain completely neutral; *see* J. TENER, MEDIATION SKILLS IN CREATIVE APPROACHES TO DISPUTE RESOLUTION 65 (1982).

79. E. KNIGHT, PRIVATE DISPUTE RESOLUTION-A GOING CONCERN IN CALIFORNIA IN CORPORATE DISPUTE MANAGEMENT 1982; J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 52, at 31.

80. *See supra* note 6.

81. *See supra* note 7.

as binding the legal jurisdiction or laws operative in the United States judicial system. Some types of Native American land claim controversies are of such a nature.[82] Nor is this intervention posture useful in resolving controversies in which one or more of the parties is openly using legal actions to enjoin conduct while simultaneously mobilizing efforts to change the law that otherwise controls the negotiating process. Environmental controversies exemplify this type of dispute.[83] What is an intervenor's role in such contexts?

### C. *Intervenor as Developer*

It is commonplace to observe that customs, practices, and values change over time. Persons can prompt change as well as adjust to it, and mediated negotiations can be an instrument for making change.

The basic premise of the Social ADR model is that no conventional rule is immutable. Nothing is ineligible for discussion. No rule exists that imposes mandatory standards for certifying the acceptability of settlement terms. This does not mean that everything, practically speaking, is possible. It means that reality is simply a troublesome practical challenge to address, rather than an impenetrable legal or conceptual constraint. Negotiators might believe—or be persuaded to believe—that it is fruitful to discuss settlement terms of issues even if implementing the agreed upon terms would require additional collaboration and efforts. One party's insistence that certain legal rights be honored does not compel compliance or foreclose discussion of changing what each party might be legally entitled or obligated to do. For instance, school officials might negotiate with parent groups regarding changes in classroom supervision procedures, even if implementing such an agreement required additional collaboration and consent from the teacher's union.[84]

Although the parties are not obligated to have their settlement terms conform to any prescribed criteria, the intervenor's job need not become comparably fluid. Some argue that the intervenor should be an aggressive advocate who insists that parties attach greater weight to the criteria he or she singles out.[85] Fisher, Ury and their adherents argue that negotiators should be evaluated based on the wisdom of the wisdom of the agreement reached[86] and the extent to which nonparticipant interests are protected by the terms of the agreement.[87] They claim that the intervenor's job is to advocate and insure such an outcome[88] (hereafter referred to as advocate intervenor). Others propose that any agreement among disputants is better than no agreement at

82. *See supra* note 65.

83. *See supra* note 59.

84. *See* COMMUNITY RELATIONS SERVICE, *supra* note 64, at 13 for a discussion of similiar disputes.

85. Susskind & Ozawa, *supra* note 2, at 263.

86. R. FISHER & W. URY, *supra* note 19, at 4.

87. *Id.*

88. Susskind & Ozawa, *supra* note 2, at 263.

all;[89] parties' preferences should be decisive and the intervenor is obligated to support that standard.[90] The nature of any particular controversy does not foreclose either intervenor posture. There is, however, a decisive reason for rejecting the advocate intervenor posture: it betrays the assumed commitment to promoting consensual decision-making by converting democratic decision-making into a hierarchical, authoritarian, dispute-settlement mechanism.

Advocate intervenors defend their proposed intervention posture by two methods: (1) requiring the parties to agree on criteria that will govern the decision-making before they discuss their substantive issues[91] or (2) announcing criteria the intervenor will insist that the parties adhere to as a condition of service.[92] Neither response is successful.

First, gaining agreement on the criteria against which proposed settlement terms are accepted or rejected simply relocates, rather than answers, the critical question. What should the intervenor's obligation be if the parties can agree to a set of criteria to guide their discussion but the mediator disapproves of their criteria? Second, even assuming that the negotiating parties agree to adopt the very criteria that the mediator endorses, there can be a subsequent controversy as to whether the proposed settlement terms are consistent with those criteria. What is the intervenor's duty if the disputing parties reach terms of agreement they believe to be consistent with the criteria, but the intervenor disagrees? If the parties agree in advance to accept the intervenor's determination, the controversy would dissolve; however, the parties are no longer engaged in consensual decision-making. Rather, they are participating in a hierarchical process in which approval for terms of settlement rests with a pre-established authoritative source—the intervenor is now the compliance officer.

The advocate intervenor posture highlights the intervenor's values but attempts, inappropriately, to make them decisive. To reject that stance does not mean that the intervenor has no values nor that the intervenor can mysteriously "leave his or her values outside the negotiating room."[93] It simply underscores the need for the intervenor to focus sharply and constantly on the matter of whose beliefs should dominate the resolution of which issues.

Conventional mediators hold that the intervenor should let the parties' preferences dominate.[94] The intervenor's job is to persuade, cajole, and press

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89. Newman, *supra* note 1.

90. *Id.*

91. Susskind & Ozawa, *supra* note 2, at 267.

92. *Id.*

93. This type of rhetoric is routinely given by trainers to persons being trained to serve as mediators for community dispute resolution programs in order to emphasize the importance of giving priority to the parties' preferences. Substantively, however, it is not accurate.

94. Newman, *supra* note 1; E. ROBINS, *supra* note 78.

parties to reach settlement.[95] One must not underestimate or neglect the influence that individual intervenors exert over various participants by discharging those duties. Can the intervenor discharge these functions without adopting some version of the advocate intervenor's posture? Though subtle and elusive, the reasons that guide an intervenor's conduct establish the affirmative answer. Presume that a group of employees submit a wage demand that the employer could pay comfortably but resists doing so. The intervenor might exert tremendous energy and personal charisma in an attempt to get the employer to pay more than his stated position rather than using that same energy to get the employees to accept the employer's last offer. That does not necessarily mean that the intervenor is not neutral. If the intervenor's assessment is that the employees will not accept anything less than their stated demand and will engage in some job action to obtain it, then the reason the intervenor might press the employer for movement is not that he or she believes that the employer *should* pay more or that the employees are *entitled* to that raise, but rather because he or she believes that the employer would opt for granting the wage demand when confronted with the costs attached to not settling.

One does not have to claim that an intervenor must have no values to be neutral in the sense required to promote consensual decision-making. Two distinctions must be made. First, an individual holds a variety of values—political, social, religious, aesthetic, educational, and moral. Second, each person prioritizes those values. It is conceivable that an intervenor can promote consensual decision-making even if some of the intervenor's values conflict with those of the participants. What must be examined is which values are in conflict and what priority the intervenor attaches to them. Assume parents demand that school officials discontinue the high school football program and spend those monies to purchase microcomputers for classroom use. While an intervenor might have personal preferences with regard to how the specific item should be resolved, he might also acknowledge that he is not in the best position to know what priority the school system attaches to parental participation and support as contrasted with maintaining the football program. Then, he could comfortably adopt the posture that his task is to assist them reach an agreement they find acceptable in its various dimensions. But a genuine conflict of fundamental values can arise. For example, if parents and school officials adopted policies that knowingly perpetuated racially discriminatory treatment of students, an intervenor might be much less inclined to grant decisive weight to their preferences. Then, given the governing commitment to promote consensual decision-making, the intervenor's responsibility is to withdraw from the discussion rather than attempt to impose his judgment on the parties in that forum.[96]

Intervenors face such conflicts regularly. Should an intervenor prevent parties from agreeing to settlement terms that the intervenor believes are less

95. *Id.*
96. Stulberg, *supra* note 32, at 116.

favorable to one party than he would have obtained under the law?[97] Should the intervenor let parties agree to unfavorable settlement terms out of ignorance and impatience rather than with informed consent?[98] Should an intervenor either block an agreement that was practically dictated by the more powerful participant or affirmatively deploy tactics to realign the power imbalance before the negotiations can conclude?[99] While these are unsettling experiences for the intervenor, the obligation is straightforward: if the parties have agreed to reach a decision through negotiations (and, in the flexible Legal ADR paradigm are jurisdictionally permitted to do so), then the intervenor should honor their preferences unless the results would violate the intervenor's more fundamental values, in which case the person should withdraw. Obviously, different persons serving as intervenors will make different judgments regarding what they consider to be fundamental concerns. Each individual should predicate his or her service as an intervenor in light of that assessment.

There are practical consequences of this commitment. If the intervenor services a range of conflicts in which the issues and potential solutions conflict frequently with positions he or she values highly, then his or her usefulness in serving as an intervenor is drastically diminished. If such occasions occur only infrequently, then no one experiences serious inconvenience.[100] No one, of course, need apologize for adhering to positions and principles that generate such conflict; all one must do is acknowledge that such beliefs and positions might functionally disqualify him from effectively executing an intervenor's role—a role that carries a primary commitment to promoting consensual decision-making by others.[101]

It is in this context that intervenors admonish one another to be neutral vis-à-vis the parties and the terms on which they settle. The assumption is that the answer to the first defining question that queried if negotiation was a valuable enterprise is affirmative. To the degree that an intervenor's scheme of values and priorities dovetails with those of the parties and the matters they are trying to resolve, then the intervenor's potential usefulness for facilitating the negotiation is enormously enhanced.[102] In this very important sense, partic-

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97. *See supra* note 9.

98. J. Folberg, *Divorce Mediation-A Workable Alternative*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 26 (1982).

99. Susskind & Ozawa, *supra* note 2, at 268-69.

100. Most individuals serving as mediators in community dispute resolution centers do not feel constrained from remaining neutral in most of the disputes that the centers service. Were it otherwise, programs dependent upon volunteer mediators could not operate effectively.

101. This is simply a different way of examining whether one's interests and aspirations propel him or her to adopt visible advocacy roles in various community and civic matters; no one is suggesting that one should not do that nor that the mediator's role is in any way more valuable than the advocate's function.

102. It is in this very important sense that who the people are who are involved in the controversy as advocates and mediators makes a decisive difference in how it will

ularly in the Social ADR context, the individuals who are involved as participants and intervenors are critical to the ultimate success of the undertaking. Progress towards agreement can be retarded or thwarted not by a substantive disagreement among the parties but by friction among the intervenor and parties.

Intervenors, like the advocates, make value judgments. It is inescapable. That does not mean, as some argue, that the intervenor can no longer be neutral in any meaningful sense.[103] An intervenor can assist parties resolve a host of practical daily problems without feeling that various resolutions conflict with the dictates of his or her fundamental critical morality. An intervenor can anchor his or her service on the commitment to make the parties take seriously their own commitment to engage in consensual decision-making. Although that leaves ample space for parties and intervenors to disagree on the specifics, it weds all of them to accepting the right of an individual or group to develop its preferred style of life based upon a showing of equal respect and dignity.

## V. CONCLUSION

Negotiation is not a rights-based dispute resolution procedure. Rather, it is a process for creating new or revised relationships of rights and obligations which requires persons to assume responsibility for shaping the events that affect their interests.

A variety of ADR programs endorse this procedure. Furthermore, they share a commitment to insuring its operative effectiveness by designing intervenor roles as support systems. This common commitment, however, masks the distinctive purposes and the resulting roles and responsibilities that each ADR program prescribes for the various participants. Each differs fundamentally on the choice of the standards applicable for guiding and measuring the acceptability of negotiated outcomes. In many institutional-based procedures, the standards or policies are detailed and pervasive. ADR efforts do not supplant those policies, but serve primarily as oversight mechanisms that simultaneously encourage persons to conciliate their differences while demanding that the outcomes be consistent with established institutional procedures. The intervenor's role is similarly defined and restricted to promoting such outcomes.

Legal-based ADR programs, though varying considerably in terms of the range of possible outcomes the parties can develop, ground the allegiance of the parties and intervenor to standards that have been properly promulgated and made public. This necessarily restricts the range of matters on which the intervenor can officially choose to remain neutral. In publicly funded ADR programs or systems serving substantial numbers of people,[104] debate and dis-

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be resolved.

103. Susskind & Ozawa, *supra* note 2, at 269.

104. *See supra* notes 6 and 7.

cussion regarding what subject matters should be placed within the forum of consensual decision-making is appropriate and, hopefully, spirited. Once they have been established, participant support of the answers, as well as their exemptions, is obligatory.

Social ADR efforts encompass those disputes in which the parties are not bound by independently prescribed standards of judgment. This does not mean that no standards are appropriate; it simply means that persons can offer differing conceptions as to what rational persons should do in those particular circumstances. Even if these standards are non-articulated, the intervenor inescapably has a personal conception of appropriate standards for judgment. Given that no outside standards automatically pre-empt his standards from being the controlling ones, the question arises as to his or her proper intervention posture. The controlling consideration is that the intervenor is a catalyst for promoting consensual decision-making by the parties. While not denying that the intervenor can exert considerable influence over the outcome. His or her primary obligation is to facilitate agreement according to the standards acceptable to the disputants, while not camouflaging the considerable influence the intervenor can exert over the outcome. Different intervenors make different personal judgments as to which of their beliefs and values they are willing to subordinate to the preferences of others. These differences simply reflect the different standards to which each person gives allegiance and which shape our individual lifestyles. Persons might dispute the propriety of someone agreeing to serve in a particular dispute. For instance, some might argue that a person who agrees to intervene in discussions between the Klu Klux Klan and local government officials about safety measures for a public parade is thereby endorsing[105] the Klan's legitimacy and, therefore, should not agree to serve as intervenor. Others might argue that serving in such a situation minimizes the potential for unnecessary acts of violence and that promoting that goal overrides other values. Such disagreements are healthy and sharpen our insights into those fundamental political and moral values that command our allegiance and the manner in which they should be applied to resolve contemporary social challenges. Such disagreements should not, however, lead to the conclusion that in those instances in which the parties' preferences conflict with those of the intervenor, the intervenor should convert his or her role from that of facilitating consensus decision-making to that of demanding compliance to specific rules of conduct. It should generate, instead, a searching inquiry about what procedures a democratic society should use in resolving both the relatively trivial as well as the most pressing social conflicts of our times.

105. COMMUNITY RELATIONS SERVICE, *supra* note 64, at 17.